IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 169

J. HOWARD McGRATH, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN,

Petitioner,

vs.

KAKU NAGANO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

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OPINIONS BELOW.

The opinion of the District Court (R. 33-37) is reported at 88 F. Supp. 897. The opinion of the Court of Appeals (R. 54-65) is reported at 187 F. 2d 759.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the brief for petitioner.

QUESTIONS PRESENTED.

1. Whether the true purpose of Section 39 of the Trading with the Enemy Act is to make provision for the net proceeds "remaining upon the completion of administration, liquidation and disposition pursuant to the provisions of this Act"[1] *i. e.*, the enemy property subject to legislative disposition after the completion of Section 9(a) returns to friendly aliens; or whether as urged by petitioner the purpose of Section 39 is by implication to bar the right of return under Section 9(a) in a suit which was

   (a) pending before the passage of Section 39; and

   (b) brought by a friendly alien resident within the United States, where such alien was of Japanese nationality.

2. Whether in holding that respondent's temporary and transitory presence in Japan did not constitute her an enemy within the meaning of the Trading with the Enemy Act, the court below correctly applied to the particular facts of the present case the rule of construction which has been uniformly followed in the federal courts in repeated decisions since the enactment of the statute in 1917.

1. Quoted language taken from Section 39; see *infra*. App. p. iii.

STATUTES INVOLVED.

The statute involved is the Trading with the Enemy Act of 1917, as amended, with particular reference to Section 9(a) and the asserted effect upon it of Section 39 as enacted subsequent to the filing of the present suit. Other sections and Executive Orders are indirectly involved insofar as they bear upon the construction of Sections 9(a) and 39. The relevant sections and Executive Orders are set forth in the Appendix, *infra*.

STATEMENT.

The present suit was filed by respondent on December 19, 1947, under Section 9(a) of the Trading with the Enemy Act, which provides for the return of vested property to owners who establish that they are non-enemies (R. 2-12).[2] The property involved is respondent's minority stock in her husband's business, The Fuji Trading Company, a corporation of Illinois organized in 1912 (R. 3). Both plaintiff and her husband are permanent residents of the United States (R. 2). The capital stock of the corporation consists of 15,000 shares of which 9,315 are owned by the husband, Shinsaku Nagano; 5,670 by respondent; and 15 by respondent's brother, Yoshi Miya (also a permanent resident of the United States; see Note 2), who was employed for many years as the company's production manager (R. 4; and opinion, *Shinsaku Nagano* v. *McGrath*, 187 F. 2d 753, 755).

The company sells oriental food products such as chop suey vegetables and sauces, bean sprouts and water chestnuts (R. 3), all produced in its canning factory in Chicago. The factory was built by respondent's husband, Shinsaku Nagano, who leased it to the company for the purpose of

2. The case is before this Court upon the government's motion to dismiss the complaint (R. 28). The District Court sustained the motion (R. 38) and the Court of Appeals reversed on the ground that the complaint set forth a good cause of action not barred by the provisions of Section 39 of the Trading with the Enemy Act (R. 65). The facts are therefore undisputed and all inferences favorable to respondent are admitted by the motion. In the present statement references are made to certain additional facts which would be competent evidence under the allegations of the complaint. All such statements are based upon the record in *Shinsaku Nagano* v. *McGrath*, 187 F. 2d, 753, which is familiar to petitioner, and are identified by reference to the present footnote.

its operation (See Note 2). The business itself was founded by Mr. Nagano in 1910. Under his management and direction it has for many years enjoyed national distribution of its products (R. 3). The business has been described as Mr. Nagano's *alter ego*.[3]

Respondent's husband has been a permanent resident of this country since 1906 (R. 2). His identity with the community is genuine and deep rooted. His investments are substantial and permanent. They have been always in Chicago, never in Japan. Mr. Nagano's testamentary plan for himself and respondent under his will executed in 1930 confirmed their Chicago residence and named a Chicago bank as trustee of his estate. He has been active in the affairs of the community, receiving, for example, the commendation of Rufus F. Dawes for his contribution of services as Chairman of the Japanese Committee during the Century of Progress Exposition (See Note 2).

As native born Japanese (R. 2) neither respondent nor her husband were eligible, under our naturalization laws, for United States citizenship. The petitioner has never determined the husband to be an enemy, nor sought to act against him under the Trading with the Enemy Act. The petitioner has not at any time questioned the loyalty of either respondent or her husband to the United States. However, if the position taken by petitioner is sound, both respondent and her husband are "nationals" of Japan who, by Section 39, are deprived of any right of recovery under Section 9(a). Nevertheless, property of the husband which had been mistakenly vested in the belief that it belonged to an enemy has recently been returned to him in a Section 9(a) proceeding: *Shinsaku Nagano* v. *McGrath*, 187 F. 2d 753 (C. A. 7th, 1951). Petitioner has not sought a review of the latter case which was decided by the Court

3. See opinion, *Shinsaku Nagano* v. *McGrath*, 187 F. 2d 753, 755.

of Appeals on the same day as the present Kaku Nagano case.

At the outbreak of the war Mr. Nagano was in Chicago but his wife was in Japan seeking to arrange the marriages of their two daughters[4] (R. 2, 6, 7). This parental purpose was shared equally between respondent and her husband (R. 6).

The circumstances leading up to the foregoing state of affairs in 1941 have their inception in the needs of the children of respondent and her husband.

After residing in the United States from the time of her immigration here in 1915 Mrs. Nagano in 1924 commenced the task of giving her son[5] an Oriental education (R. 6). Her husband considered such an education to be a necessary qualification for their son's ultimate entry into the company's importing business (R. 6). It was the common plan of both parents that the son might ultimately relieve the father of the necessity of making annual purchasing trips to the Orient to establish sources of supply and secure the raw material inventories needed for the business. (See note 2.)

A Japanese education for the daughters was considered needful to enhance their prospects for marriage, limited as they were to members of their own race (R. 6). All choice of decision on bringing the daughters to the United States was taken away by the Oriental exclusion provisions of the Immigration Act of 1924, 43 Stat. 153, 8 U. S. C. 201, *et seq.* (R. 6, 19, 20, 56).

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4. Born in Japan, respectively, in 1914 and 1919 (R. 5, 6). The first daughter was born prior to respondent's immigration to the United States (R. 5). The second daughter was born during a stay in Japan while on a voyage occasioned by Mr. Nagano's convalescence from influenza suffered during the 1919 epidemic (R. 6).

5. Born in Chicago in 1916.

Mrs. Nagano rejoined her husband at Chicago in 1929[6] and again in 1932, each time remaining for nearly a year (R. 7, 51). In administrative proceedings the Department of Justice (Immigration Service) has found as a fact that on both of these occasions she entered as a permanent resident returning from a temporary absence abroad (R. 51). Absences from the United States prior to 1933 are therefore not material to the case. The factual issue involved in the second "question presented" (*supra*, p. 2) is whether the period from 1933 to 1941[7] represented a temporary and transitory absence, having in mind that the facts are undisputed and that all inferences favorable to respondent are admitted by the motion to dismiss (R. 28-32).

In 1933 one daughter had already attained marriageable age (19 years). The other daughter would do so by 1937 (R. 6). The son was old enough (age 17; R. 6) so that his mother's presence would no longer be necessary during the completion of his university education. During Mrs. Nagano's absence from 1933 to 1941 her efforts were devoted almost exclusively toward arranging marriages for the daughters (R. 6, 19).

In Japan such marriages are arranged for by the parent and a friend acting as intermediary who is called a matchmaker. The presence of the parent with the unmarried daughter is indispensable (R. 6). A record of respondent's efforts toward these marriages is preserved in respondent's voluminous correspondence (R. 7, 20), all written years before any such correspondence could be regarded as self-serving. Her letters to her husband establish that marriages seemed imminent in 1939, 1940 and 1941, and that

6. The government suggests that there is some doubt as to the 1929 entry (Brief, p. 4, n. 2). This entry was found to be a fact (R. 51).

7. The war eliminated all possibility of return after 1941 until permission to return was obtained in 1950 (R. 49-51). Hence only the period 1933-1941 is involved.

she had a lively expectation of an early consummation of her duties, to be followed by a prompt and final return to the United States (R. 7; see also note 2).[8]

Such facts and others, including the corroborating testimony of persons in Japan, were reviewed by the United States Department of State. As a result a visa was granted under Section 4(b) of the Immigration Act to Mrs. Nagano as a permanent resident returning from a temporary visit abroad (R. 49, 50). Subsequently, upon respondent's physical entry into the United States, the Justice Department, Immigration Service, taking note of the period of absence, convened a Board of Special Inquiry which made a *de novo* investigation. From this investigation the Immigration Service reached the conclusion (R. 50) that

> "there is ample evidence of record to support the conclusion reached by the Board of Special Inquiry and the American Consular Service that the Appellant is returning from a temporary visit abroad."

Considering the allegations of the complaint, the Court below arrived at the parallel view that

> "the fact that she went to Japan in an attempt to discharge her parental duties does not negate the fact that her permanent residence was in Chicago and that her stay in Japan was for a limited period of time entailed by her praiseworthy sense of family obligation",

and concluded that "there is nothing in the averments of fact justifying a conclusion of fact that plaintiff was 'resident within' Japan" (R. 58, 59).

In reply the government contended that regardless of respondent's United States residence, her right of recovery under Section 9(a) of the Trading with the Enemy Act was

8. It would be competent upon the trial to complete the history of the marriage efforts by establishing that the marriages were in fact consummated, the second marriage taking place immediately before Mrs. Nagano's return to the United States.

taken away by Section 39 enacted on July 3, 1948, while the present suit was pending. The court below held that Section 39 was not applicable because it was concerned with forfeitable enemy property (R. 64) rather than friendly property which is the only kind returnable under Section 9(a). A conflicting conclusion has been reached by the Court of Appeals for the District of Columbia in the case of *Guessefeldt* v. *McGrath*[9] and this Court has granted certiorari in both cases.

9. No. 10,600, May 3, 1951 (C. A. D. C.) (pending on writ of certiorari, No. 204, this term). The conclusions by the respective courts are in conflict but respondent's position is that the cases are distinguishable because the *Nagano* case was filed before the enactment of Section 39.

SUMMARY OF ARGUMENT.

I. Section 39 of the Trading with the Enemy Act does not affect the right of suit heretofore existing under Section 9(a) because (a) Congress intended to deal only with the fund of enemy property remaining after administration and disposition, including Section 9(a) returns; (b) no amendment of Section 9(a) could have been lawfully effected in the form in which Section 39 was passed; and (c) so long as resident aliens are classified as friends, no constitutional right exists to deprive them of the right to recover property erroneously seized.

Congress' intention in passing Section 39 is established by the *functions* of that section within the framework of the Act, by its *language*, and by the *legislative history*.

1. *Functions of Section 39.* Section 9(a) is concerned exclusively with the return of friendly property. After friendly property has been returned there remains a fund of enemy property. Section 12 of the Act provides that after the end of the War the enemy property is to be disposed of as Congress directs. Necessarily the *function* of Section 39 is one of two things: (1) to dispose of the enemy property as contemplated by Section 12; or (2) to dispose of all property whether enemy or friendly, and whether taken by mistake or not, which belongs to Germans or Japanese even though they are lifelong residents of the United States. The first function obviously permits the parts of the Act, Sections 9(a), 12, 32(a) and 39 to work together as an integrated whole. The second function must be rejected as having no reasonable relationship to the structure of the Act. It brings Section 39 into conflict with Sections 9(a), 12 and 32(a) because it would "repeal" Sec-

tion 9(a), dispose of funds not contemplated under Section 12, and eliminate the right of judicial review provided under Section 9(a) which made practicable the omission of any such right under Section 32(a). The second function is tantamount to declaring that Congress by mere implication alone intended to bar the *return* to a lawful resident alien of property which our legislative and administrative policy *never intended to be taken away* on the mere ground, by itself, of technical enemy citizenship.[10] As said in *Ex Parte Kumezo Kawato*, 317 U. S. 69, 76 (1942), the Trading with the Enemy Act was never intended, without Presidential proclamation, to affect resident aliens at all.

2. *Language of Section 39; the word "national".* The language of the Act states expressly that it is dealing not with vested property generally but only with the net proceeds remaining after "*administration, liquidation* and *disposition*" otherwise provided by the Act. Returns of friendly property under Section 9(a) are clearly included within the term "administration and disposition." Furthermore, the net proceeds clause plainly signifies that Congress is looking to the fund of enemy property which can be disposed of only by legislative authority and direction. Even if consideration of the language of Section 39 is pin-pointed upon the single word "national", a successful claimant under Section 9(a) will have succeeded in establishing that she is not a "national of a designated enemy country." This is the only sense in which "national" is used in Section 39 since only such nationals are the intended objects of the vesting process.

3. *Legislative History.* The legislative history of Section 39 includes explicit statements in the Committee reports that the fund dealt with is *enemy* property and also statements by the Honorable Dean Acheson, then Acting

10. See brief for the government, p. 21, n. 11.

Secretary of State and John Ward Cutler, Acting General Counsel, Office of Alien Property, proposing the legislation in very nearly the language ultimately adopted. The statements in question expressly identify the property as that which remains after Section 9(a) returns and identify the words "after administration, liquidation and disposition" as signifying such property only.

II. No amendment by implication, retroactive or otherwise, but particularly a retroactive amendment, of Section 9(a) could have been lawfully effected by Section 39 without even a reference to Section 9(a). This follows not only from the accepted rules of statutory construction but from the express provisions of 61 Stat. 633, 1 U. S. C. 109, providing that the repeal of any statute (even an express repeal) shall not release or extinguish any liability thereunder unless the repealing act shall expressly so provide.

III. No constitutional right exists to deprive friendly aliens of their property without just compensation, the Supreme Court having held that the constitutional guarantee includes such aliens. Resident aliens are still deemed friendly, regardless of nationality and are therefore within the guarantee. The validity of the Trading with the Enemy Act depends upon adequate provision for the return of property in case of mistake.

IV. No valid reason exists for modifying the decision of the Court of Appeals that upon the facts alleged respondent was not "resident within" Japan since the decision involves only the application of familiar rules to the particular facts and no conflict of decision or other important question is presented to this Court. In administrative proceedings based upon actual evidence petitioner's Immigration Service has determined that respondent's absence in Japan for family purposes, before she returned to her hus-

band, was only temporary. The Court of Appeals has properly decided that under the complaint respondent may establish that she was not "resident within" Japan and was not an "enemy".

The government did not contend in the Court of Appeals nor in its petition for a writ of certiorari that respondent's mere presence in the enemy country by itself would bar recovery under Section 9(a). That contention, belatedly added to the government's present brief, is without merit because although presence in the enemy country may justify vesting (which is authorized on the basis of appearances, without investigation), yet it is uniformly held that such presence does not foreclose judicial relief in a Section 9(a) suit. In such a suit relief is barred only by enemy character based on residence in the enemy country or other actual enemy taint.

The decision below should be affirmed.

ARGUMENT.

I.

In Enacting Section 39 of the Trading With the Enemy Act, Congress Had No Intention of Amending Section 9(a) Providing for the Return of Friendly Property Because the Concern of Congress Was Exclusively With the Enemy Property Subject to Legislative Disposition After Administration and Disposition Including Section 9(a) Returns.

Specifically, the concern of Congress in enacting the War Claims Act of 1948 of which Section 39 was a part, was (a) to create a war claims plan under which it would designate the classes of persons to whom vested enemy property would be distributed after the war; and (b) to express the irrevocable policy decision that enemy property would not ever be returned to former enemies as was done after World War I.[11] This intention is clearly established by the functions of Section 39 within the framework of the Act. It is established by the express language of the Act and equally by the legislative history of the Act.

At the outset of its argument the government quotes Section 39 and states that it is a "flat, unqualified prohibition" of returns to German or Japanese nationals.[12] The fallacy of the assertion, however, is in effect pointed out by the petitioner itself. In order to maintain its logical

11. So held below in the District Court (R. 36-37) and in the Court of Appeals (R. 64).

12. Brief, pp. 10-11.

position petitioner found it necessary to omit from the quoted section the following clause:

> "The *net* proceeds, remaining upon the completion of administration, liquidation and disposition *pursuant to the provisions of this Act* of any such property or interest therein shall be covered into the Treasury at the earliest practicable date." (Emphasis supplied.)

As will be seen in the discussion below of the functions of the Act and its legislative history, the last quoted language identifies the property involved in Section 39 as the fund of *enemy* property remaining after Section 9(a) returns, which is returnable only by Congressional action.[13]

The "flat unqualified prohibition", moreover, is not substantially different from and no more drastic than the Act of Congress adopted in 1921[14] following World War I, but up to the time of petitioner's present brief no one to our knowledge (including the government or any court) has ever suggested that the 1921 Act applied to Section 9(a) returns. That Act provided that "*all* property" of "*all* German nationals" "*shall be retained by the United States of America.*"

We hasten to add that after the words "United States of America" there followed: "and no disposition thereof made *except as shall have been heretofore* or specifically hereafter shall be *provided by law.*" The omission of the latter clause would of course produce a "flat unqualified prohibition" just as does the above mentioned omission of language from Section 39.

1. *Functions of Section 39.* Initially, property is seized by the Alien Property Custodian on *suspicion* that it is

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13. See legislative history, *infra*. p. 26 *et seq.*

14. 42 Stat. 105-107; for further discussion see *infra*. p. 32.

enemy property, the action being taken on appearances and without investigation.[15]

By definition, Section 9(a) is a proceeding for the return of property to "*any person not an enemy* claiming any interest, right or title in any money or other property which may have been seized by him" (the Custodian).[16] (Emphasis supplied.)

Under Section 2 (a) of the Act "residence within" the enemy country is made the test for determining whether an individual is an "enemy",[17] so that in a Section 9 (a) suit the issue is made to turn upon residence and not upon nationality. In World War II the necessity of coping with disguised enemy interests gave rise to a broadened concept of "enemy" as expressed in the term "national of a designated enemy country."[18] The broadened term per-

15. "If he has a strong suspicion that property is German property it is his conscientious duty to vest it. Subsequent investigation may indicate that he was mistaken, and in such a case he will return the property":—testimony of Max Isenbergh, Chief, Appeals and Legislative Branch, Office of Alien Property, Justice Department, given before subcommittee of the Senate Committee on the Judiciary in hearings on the War Claims Act, 80th Congress, Second Session, page 13 of printed report of hearings. See also *Clark* v. *Uebersee Finanz-Korporation*, 158 F. 2d 313, at 315 to the same effect.

16. Sec. 9(a), *infra*, App. p. i.

17. Sec. 2(a), *infra*, App. p. i.

18. Defined in Executive Orders 8389 and 9095 promulgated under the authority of Section 5(b), *infra*, App. pp. iii, iv. See *Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480, 485 (1947) in which the court explained that Germany had developed techniques for concealing enemy ownership, particularly through the corporate guise. The opinion goes on (page 485): "Section 5(b) was amended on the heels of the declaration of war to cope with that problem. Congress by that amendment granted the President the power to vest in an agency designated by him 'any property or interest in property of any foreign country or national thereof.' The property of all foreign interests was placed within the vesting power not to appropriate friendly or neutral assets, but to reach enemy interests which masqueraded under those innocent fronts."

mitted persons, even United States citizens, to be characterized as such "nationals" if they were acting "on behalf of (including cloaks for) the enemy."[19] The residence test, however, was retained, with the result that persons not "resident within" the enemy country are not considered "nationals" thereof by reason of enemy citizenship alone.[20] Indeed, the question of whether Mrs. Nagano was "resident within" Japan is one of the two issues which petitioner has brought to this Court for review.[21]

Section 9 (a) is, therefore, concerned exclusively with the return of non-enemy (that is to say, friendly) property, determined according to the test of residence.

After Section 9 (a) returns have been completed, the fund of property remaining in the hands of the Custodian consists of enemy property alone. Obviously it is necessary to look elsewhere in the Act than Section 9(a) to ascertain what disposition is contemplated for this enemy fund. A direct provision in this regard is found in Section 12, as follows:

> "After the end of the war any claim of any enemy or ally of enemy to any money or other property held by the Alien Property Custodian * * * shall be settled as Congress shall direct."

After the end of World War I, the fund of enemy property referred to in Section 12 was first retained under the provisions of the Resolution of Congress Terminating the War with Germany, July 2, 1921, 42 Stat. 105-107, and finally returned in part (80% returned, 20% retained) under the Settlement of War Claims Act of 1928, 45 Stat. 254-279.

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19. Executive Order 9095, Par. 10(a), *infra*, App. p. iv.

20. See authorities and exception in Executive Order 9095 cited and discussed *infra*, pp. 44 *et seq.*; 52 *et seq.*

21. Brief for petitioner, page 2, second question.

After the end of World War II two sections were enacted providing for the disposition of the fund in question. Section 32(a)[22] and Section 39.[23] Section 32(a) provided for returns as a matter of administrative discretion to persecutees and other individuals who are technically enemies and who would not be entitled to the return of property under Section 9(a).[24] Section 39 provides that *"The net proceeds remaining upon the completion of administration, liquidation and disposition pursuant to the provisions of this Act"* shall not be returned to nationals of Germany or Japan but "shall be covered into the Treasury" to be applied in payment of certain war claims.

In identifying the functions of Section 39 it is necessary to take into consideration the fact that it is one of an integrated series of provisions contained in the War Claims Act of 1948, 62 Stat. 1246. It appears as Section 12 of that Act. The Act in question was a comprehensive measure defining the classes of persons entitled to file war claims. Such claims included employees of contractors;[25] civilian Americans who were captured or who went into hiding to avoid capture at Midway, Guam, Wake Island and the Philippine Islands;[26] prisoners of war;[27] and religious organizations.[28]

The nature and limits of the claims were defined, *e. g.*, detention benefits at the rate of $60.00 per month.[29] A

22. *Infra*, App. p. ii.

23. *Infra*, App. p. iii.

24. *McGrath* v. *Zander*, 177 F. 2d 649, 652 (1949); see Sec. 32 (a), *infra*, App. p. ii. The same point is made in the government's brief, p. 12.

25. Sec. 4, War Claims Act of 1948.

26. *Id.* Sec. 5.

27. *Id.* Sec. 6.

28. *Id.* Sec. 7.

29. *Id.* Sec. 5(d).

War Claims Commission was created with jurisdiction to receive and adjudicate the claims in question.[30]

Section 13 creates on the books of the Treasury of the United States a War Claims Fund, consisting of the sums covered into the Treasury under the provisions of Section 12 (Section 39 of the Trading with the Enemy Act, as amended). The intention of the Congress, therefore, was obviously centered on the creation of machinery for the establishment of the claims of those persons and corporations included within the purview of the Act and the creation of a war claims fund from which such claims could be paid. The latter fund was created exclusively out of *enemy* assets held in the hands of the Alien Property Custodian.[31] It follows that there was no intention to interfere with the long established provision of the Trading with the Enemy Act affording relief to *non-enemy* aliens, it being observed that Section 9(a), *by definition*, is concerned only with returns to non-enemies.

If Section 39 is considered solely from the standpoint of its mechanical function, it will readily be seen that there are only two possible functions as follows:

> (i) To dispose of the "net proceeds" remaining in the hands of the Custodian after administration, liquidation, and disposition pursuant to the other provisions of the Act. Such proceeds consist of the fund of enemy property remaining after the property taken by mistake has been returned, under Section 9(a), to non-enemy owners, as a part of the "disposition" referred to in Section 39. It is the same fund of *enemy* property which remained after the end of World War I *after* all Section 9(a) claims had been paid. Eighty per cent of the World War I fund was returned to former enemies not under Section 9(a) but as a for-

30. *Id.* Secs. 2, 3.

31. So stated in Report of the Committee on the Judiciary, Senate Report No. 1742, June 16, 1948 (quoted, *infra*, p. 31.).

> giveness measure. The above fund of enemy property remaining after World War II, however, is *never* to be returned to former enemies. Instead it will be paid in satisfaction of war claims, not to the enemies but to the persons who suffered losses at the hands of the enemies.

The Court below held in substance that the foregoing is the function of Section 39 (R. 64).

If the function of Section 39 is not as above stated, then, alternatively the function must be:

> (ii) To retain, in addition to enemy property, all property whether taken by mistake or not, and whether in friendly hands or not, which belongs to persons who are citizens of Germany or Japan regardless of whether such persons are lifelong loyal residents of the United States.

The second function represents the position asserted by the petitioner herein.

The first function fits precisely into the framework of the Act and permits its several parts—in particular Sections 9(a), 12, 32(a) and 39 to work together as parts of an integrated whole.[32]

Summarizing the operation of these parts:

> Section 9(a): Authorizes returns to friendly aliens, particularly our own residents of whatever nationality. Provides judicial hearing and review. Preserves the constitutionality of the Act by guaranteeing returns to friendly aliens in case of vesting by mistake.
>
> Section 12: Directs that after the end of the war *enemy* property shall be disposed of as Congress may direct.

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32. In *Markham* v. *Cabell*, 326 U. S. 404, in holding to the effect that by amending Section 5(a) Congress did not intend to delete Section 9(a) the court said: "The normal assumption is that where Congress amends only one section of a law, leaving one untouched, the two were designed to function as parts of an integrated whole."

Section 32(a): Serves the limited purpose of providing speedy administrative relief (when found by the Executive to be in the interest of the United States) on a discretionary basis primarily to persons who were technically enemies such as Frenchmen and Belgians in occupied territory.[33] Action not subject to judicial review.

Section 39: Assures that the net fund of enemy property remaining after administration, liquidation and disposition, in the estimated amount of $200,000,000[34] will never be returned to the German and Japanese enemy aliens from whom it was vested. Implements the War Claims Act of 1948 under which this $200,000,000 fund will be applied for the benefit of designated classes of claimants.

In decided contrast the function contended for by the government plainly conflicts with the other provisions of the Act. The government's very appeal in this case is predicated on the claim that Section 39 conflicts with Section 9(a) and that the latter was impliedly repealed or superseded. If Section 39 as construed by the government does not conflict with Section 12 it certainly does not harmonize with Section 12 for the latter Section contemplates that the congressional attention after the war will be directed to the fund of enemy property remaining *after* Section 9(a) returns. The government construction of Section 39 even conflicts with Section 32(a), for the latter section is discretionary and denies judicial review, which is practicable only so long as Section 9(a) assures returns to friendly resident aliens in compliance with constitutional requirements. Such Section 9(a) returns are denied in large part under the government's construction. With these facts in mind it is apparent that the "harmony" suggested at page 14 of the government's brief is illusory. It is true also that there is no merit

33. *McGrath* v. *Zander*, 177 F. 2d 649, 652; see also government brief, p. 12.

34. See *infra*, p. 31.

in the further claim at page 14 of the government's brief that Section 39 has no meaning if it does not bar Section 9(a) suits. It has the same meaning as the 1921 Act. It disposes of a fund of enemy property estimated to amount to $200,000,000.

The extreme limit to which the government's contentions extend are illustrated by a concrete example:—the case of respondent's husband, Shinsaku Nagano, a resident of Chicago since 1906 and present in Chicago throughout the war. Shares of stock belonging to him were seized in the mistaken belief that they belonged to another person who was then thought to be an enemy. The husband himself was never intended to be a target under the Trading with the Enemy Act. Yet in the government's petition for rehearing in the *Shinsaku Nagano* case the government asserted that Section 39 was a bar to recovery.[35] In its present brief the government now suggests that Nagano would have been "presumably" eligible for administrative return under Section 32(a) (2)(D).[36] Such a suggestion is irrelevant since the allowance of claims under the latter section is a matter of arbitrary administrative relief not subject to judicial review.

Nagano in fact did seek discretionary relief under the provisions in this regard contained in Section 9(a) and he was denied such relief on the asserted ground that he was not the owner of the property. Had Section 32(a) been the only channel of relief it would then have been impossible to have the judicial determination of ownership which was actually made under the provisions of Section 9(a).

2. *Language of Section 39.* (*i*) *"Net proceeds."* As has been pointed out in discussing the functions of Section 39, the subject matter upon which it operates is not all prop-

35. Copies of the petition have been filed in the Supreme Court.

36. Brief, p. 6, n. 3.

erty vested, but only "*net proceeds*" consisting of enemy property remaining after Section 9(a) returns as a part of the "administration, liquidation and disposition pursuant to the provisions of this Act."[37] (The return of *non-enemy* property under Section 9(a) is essential to the constitutionality of the Trading with the Enemy Act: *Central Trust Co.* v. *Garvan*, 254 U. S. 554, 566 (1920); *Becker* v. *Cummings*, 296 U. S. 74, 79 (1935). Only the remaining net fund consisting of *enemy* property is without the constitutional protection.[38])

Since the fund dealt with by Section 39 consists only of enemy property not returnable under Section 9(a) it is immaterial to the present case that the latter fund may not be returned to "nationals" of Germany or Japan even if such "nationals" are assumed *arguendo* to include friendly American residents.

Section 32(a) contains specific provisions for the return of certain enemy property to persecutees who are technical enemies.[39]

Thus it became essential that Section 39 (dealing with enemy property) should include an express exception as to Section 32(a) (also dealing with enemy property). The fact that Section 9(a) is not referred to in Section 39 does not evidence any intent to repeal Section 9(a) but on the contrary evidences recognition that Section 9(a) is concerned with a wholly different fund, *i. e.*, friendly property.

Language of Section 39: (ii) The Word "National".

Even if the entire issue with respect to Section 39 is made to turn upon the literal meaning of a single word:—

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37. Section 9(a) contains both administrative and dispository provisions.

38. *Infra*, Point III, p. 37.

39. *Supra*, p. 18 and note 24.

"national",[40] (without regard to the fact already pointed out that the fund of *enemy* property involved is one with which we are not concerned in the present Section 9(a) suit) the same result is still reached. In Section 39 the word "national" is used in the sense of "national of a designated enemy country" *because the latter class is the only one made subject to the vesting process in the first place.*[41] Such enemy nationals could not in any event succeed under Section 9(a): *Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480, 486, 487 (1947). Their suit would fail under the provisions of Section 9(a) itself and not because of anything contained in Section 39.[42] Their only hope of recovery is by legislative grace or forgiveness such as followed World War I.[43] It is this forgiveness which Section 39 determined to rule out.

The government's brief stresses that respondent was a "national", *i. e.*, a "national of a designated enemy country" for the purpose of vesting. Such a status, however, was essentially presumptive in character for it was based on suspicion and not on investigation. In order to facilitate the vesting process the status was merely deemed to exist. The determination in this regard for the purpose of *vesting* was not necessarily the status for the purpose of the return of property under Section 9(a). For the purpose of *returns*, one who was found to be a "national" for vesting is not precluded from establishing in a Section 9(a) proceeding that he is not such a "national". In *Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480, 486 it is stated expressly that the fact that the

40. The decision in the *Guessefeldt* case and the argument of the government are predicated almost entirely on the claimed literal meaning of the word "national."

41. Sec. 5(b) and Executive Orders 8389 and 9095, *infra*, App. pp. i, iii, iv.

42. Precisely as stated by Judge Campbell (R. 36).

43. Settlement of War Claims Act of 1928, *supra*, p. 17.

seizure was permissible does not signify that there is no remedy under Section 9(a). Every successful Section 9(a) suit arising out of World War II is based upon a finding that the successful litigant was not a "national"; and therefore such a litigant would not be within the intendment of Section 39. Neither the President nor the Congress has at any time modified the traditional[44] policy of this country that our own residents are not enemies, regardless of technical enemy citizenship. The courts have held likewise.[45]

Respondent is not a "national of a designated enemy country" and therefore she would not come within the terms of Section 39 even if Section 39 were concerned with friendly property.

The contention of the government in this case that Section 39 literally prohibits Section 9(a) returns to all persons of German or Japanese citizenship including our own loyal residents, must also be read in the light of a consistent record of previous attempts to effect the nullification of Section 9(a) by applying the asserted meaning of some

44. As stated by Alexander Hamilton in one of his famous *Camillus* Letters (Letter IXX): "There is no parity between the case of the person and goods of enemies found in our country and that of the persons and goods of enemies found elsewhere. In the former there is a reliance upon our hospitality and justice; there is an express or implied safe conduct; the individuals and their property are in the custody of our faith; they have no power to resist our will; they can lawfully make no defense against our violence; *they are deemed to owe a temporary allegiance;* and for endeavoring resistance would be punished as criminals, a character inconsistent with that of an enemy. To make them a prey is, therefore, to infringe every rule of generosity and equity; it is to add cowardice to treachery * * *" It will be observed that the foregoing views are in strikingly close parallel with the opinion of the court below as to the proper concept of citizenship (R. 64).

45. Opinion below (R. 59-60); *Guessefeldt* v. *McGrath*, No. 10,600 May 3, 1951 (C. A. D. C.); *McGrath* v. *Zander*, 177 F. 2d 649 (1949); *Sarthou* v. *Clark*, 78 F. Supp. 139, 142 (D. C. Cal., 1949).

other provision taken out of context. In *Markham* v. *Cabell*, 326 U. S. 404, 409 (1945), the government contended that claims under Section 9(a) arising out of World War II vestings were barred by the provisions of Section 9(e) to the effect that no debt shall be allowed under Section 9 *unless the debt was owing prior to October 6, 1917*, and a claim filed prior to the date of enactment of the Settlement of War Claims Act of 1928.

The Supreme Court replied (opinion, page 409):

> "Yet the remedy afforded by Section 9(a) would be quite illusory and ineffective so far as it applies to World War II claims if Section 9(e) were read literally without regard to its history. It was for this reason that the court below refused to 'make a fortress out of the dictionary' and to read Section 9(e) strictly and literally. The policy as well as the letter of the law is a guide to decision. Resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes, as *Holy Trinity Church* v. *United States*, 143 U. S. 457, illustrates. The process of interpretation misses its high function if a strict reading of the law results in the emasculation or deletion of a provision which a less literal reading would preserve."

In *Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480, 485 (1947), the government once again unsuccessfully tried to nullify Section 9(a) by standing upon the power given under Section 5(b) to vest the property of any *foreign* (friendly or enemy) country or national. A similar attempt was made in *Draeger Shipping Co.* v. *Crowley*, 49 F. Supp. 215 (1943), and at least two attempts have been made to repeal Section 9(a) by legislative enactment (See discussion, opinion below, *Nagano* v. *McGrath*, (R. 63)). All such attempts have been rejected.

3. *The legislative history.*[46] Mr. Dean Acheson, then

46. All italics in quoted matter below have been supplied.

Acting Secretary of State and John Ward Cutler, Acting General Counsel, Office of Alien Property, proposed to Congress the form of World War II War Claims Act which their respective departments favored. These proposals were almost literally adopted as Section 39. In making the proposals Messrs. Acheson and Cutler clearly indicated:

> (a) that the assets involved are those remaining after the completion of the program of allowance of claims as required by existing policies and existing law;
>
> (b) that the property involved is that which cannot be returned without congressional action;
>
> (c) that the language "net proceeds remaining upon the completion of administration, liquidation and disposition" refers to net proceeds after payment of Section 9(a) claims;
>
> (d) that liquidation itself by law cannot proceed until Section 9(a) claims are disposed of;
>
> (e) that there should be an express declaration of legislative policy that plans for the ultimate disposition of *such* proceeds shall make no provision for any return or compensation to former owners.

The foregoing statements were made during hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 80th Congress, on H. R. 873, H. R. 1823, H. R. 1000 and H. R. 2823, March and April, 1947. These bills were the initial proposals for World War II war claims legislation. None of the bills then pending represented precisely what was desired by the State and Justice Departments, whose views had been requested.[47] The proposals thereupon submitted by Messrs. Acheson and Cutler correspond nearly literally with H. R. 4044 and

47. H. R. 873 was directed against the German, Japanese and Italian governments. H. R. 1823 was directed against the Japanese only and included a much narrower range of claims to be recognized.

obviously constitute its genesis. H. R. 4044 subsequently was enacted as the War Claims Act of 1948.

Mr. Acheson's proposals were submitted in a letter to the Committee[48] which included the following:

Acheson Letter.	Corresponding Passages In War Claims Act of 1948.
"It is believed that Congress might give consideration to the enactment of legislation along the following lines:	Section 12: (Section 39, Trading with the Enemy Act.)
1. Requiring that German and Japanese assets in the United States be liquidated and the proceeds covered into the Treasury *after completion of administration and allowance of claims* as required by existing policies and existing law."[49]	"The net proceeds remaining upon the completion of administration, liquidation and disposition pursuant to the provisions of this Act of any such property or interest therein shall be covered into the Treasury at the earliest practicable date."
"2. An express declaration of legislative policy that plans for the ultimate disposition of such proceeds shall make no provision for any return or compensation, direct or indirect, by the United States to the former owners."	"No property or interest therein of Germany, Japan or any national of either such country vested in or transferred to any officer or agent of the government at any time after Dec. 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein."
"3. That a war claims tribunal be established vested with jurisdiction to adjudicate the following classes of claims on behalf of citizens of the United States * * *."	Section 2(a): "There is

48. Reproduced at page 3 of the printed hearing.

49. See the *Isenbergh* testimony, *infra*, p. 31.

hereby established a commission to be known as the War Claims Commission * * *."

Section 3. "The Commission shall have jurisdiction to receive and adjudicate according to law claims as hereinafter provided."

The testimony of Mr. Cutler (hearings pp. 10, 11) contains phraseology literally adopted in Section 39 as will be observed:

John Ward Cutler Testimony.	Corresponding Provisions of Section 39.
"It is our recommendation that vested German and Japanese property should not be returned to its former owners and there should be no provision for compensation of such owners by this government, although it may be appropriate that the German and Japanese governments be required eventually to compensate their own nationals."	"No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agent of the government at any time after Dec. 17, 1941, pursuant to the provisions of the Act, shall be returned to former owners thereof or their successors in interest and the United States shall not pay compensation for any such property or interest therein."
"Title to vested property is now in the United States *and return cannot in any event be made without congressional action.*[50] The Congress may accordingly wish to declare itself against return with respect to Ger-	

50. See *infra*, p. 31, Max Isenbergh testimony that the total vesting would be $359,000,000 and that after administration, liquidation and returns there would remain a net fund to be disposed of in the neighborhood of $200,000,000.

many and Japan. Property formerly owned by nationals of Italy raises certain special problems upon which I believe representatives of the Department of State are best qualified to speak."

"The *net proceeds* of German and Japanese property *remaining after its administration, liquidation and disposition is completed in accordance with present law should* in our judgment be *covered into the Treasury* in line with the policy of non-return."

"The Office of Alien Property is proceeding as rapidly as possible with the liquidation of vested property. *Some of it, however, cannot be liquidated until lawsuits filed by persons who assert that they are not enemies are finally determined. The Trading with the Enemy Act in the present state of the law, requires that property involved in such suits must be held intact while the suits are pending.* Further, vesting is still in progress and substantial amounts will be added to the total before the vesting program is completed."

"The net proceeds remaining upon the completion of administration, liquidation and disposition pursuant to the provisions of this Act of any such property or interest therein shall be covered into the Treasury at the earliest practicable date."

It will be seen that the key passage in the Cutler statement commencing with the words "the net proceeds" was incorporated almost verbatim into Section 39 while

at the same time Mr. Cutler made an explicit statement that the words "net proceeds after administration, liquidation and disposition" refer to the property which can only be returned by congressional action, *i. e.*, the *enemy* property remaining in the hands of the government after returns to non-enemies have been completed.

The testimony of Mr. Cutler is illuminated by certain additional facts supplied in testimony of Max Isenbergh, Chief, Appeals and Legislation Branch, Office of Alien Property, when Section 39 was being considered.[51] Mr. Isenbergh stated that some $359,000,000 would ultimately be vested and that the net vesting after administration, liquidation and returns would be "in the neighborhood of $200,000,000 net." The $200,000,000 balance remaining after returns is the fund of enemy property designated by Section 12 which can be returned, after the war, only by Congressional action. Mr. Cutler identifies it as the fund he had in mind when he said "Title to vested property is now in the United States and return cannot in any event be made without congressional action."[52]

The House Report (No. 976) accompanying H. R. 4044 stated, page 1, that:

> "The policy expressed in this section has the active support of the Department of State, the Attorney General and the Treasury. It is based on the firm resolve not to permit the recurrence of events which after the close of World War I led to the return of *enemy* property to the former owners."

And the Senate Report (No. 1742)[53] accompanying H. R. 4044 stated likewise that:

> "Section 12 of this act amends the Trading with

51. Hearings before the sub-committee of the Senate Committee on the Judiciary, 80th Congress, Second Session, on H. R. 4044; printed report pp. 14, 15.

52. See *supra*, p. 29.

53. U. S. Code Congressional Service, 1948, Vol. 2, p. 2317. The House Report is not reproduced in the Service.

> the Enemy Act so as to retain the *enemy* assets now held in the hands of the Alien Property Custodian and makes the residue of such assets available for the creation of a war claims fund as set forth below."

These reports thus emphasize that the property being retained is *enemy* property. They follow the Acheson and Cutler statements and they are in complete accord with the interpretation which the courts below gave to Section 39 (R. 60, 64).

The true significance of the legislative history is highlighted by the fact that Section 12 of the Trading with the Enemy Act provides that "after the end of the war" Congress shall direct the disposition of the enemy property seized during hostilities.

After the end of World War I a resolution terminating the war was passed by Congress on July 2, 1921 (42 Stat. 105-107), Section 5 thereof providing that:

> "All property of the Imperial German Government, or its successor or successors, and of all German nationals, which was, on April 6, 1917, in or has since that date come into the possession or control of, or has been the subject of a demand by the United States of America or any of its officers, agents or employees * * * shall be retained by the United States of America and no disposition thereof made except as shall have been heretofore or specifically hereafter shall be provided by law * * *."[54]

The nearest approach to a saving clause in the 1921 Act is the reference to "disposition thereof * * * heretofore * * * provided by law" which corresponds to the language "after * * * disposition pursuant to the provisions of this Act" contained in Section 39. *Yet neither the government nor any court has ever interpreted the 1921 Act as barring Section 9(a) claims.*

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54. H. R. 873, above referred to, was modeled upon the 1921 Act.

The intimation is now made in the government's brief that the 1921 Act did bar Section 9(a) suits.[55] The government thus joins with respondent in recognizing the similarity of the 1921 Act to Section 39. However, none of the cases cited by the government support in any way the view that the 1921 Act had any relationship to Section 9(a) suits. *Klein* v. *Palmer*, 18 F. 2d 932 (C. C. A. 2d, 1927)[56] was not a Section 9(a) suit, but was a suit for damages and equitable relief arising out of alleged tortious conduct by the Custodian as an individual. It was held that the Treaty of Berlin protected agents of the government from such suits. All of the other cases cited on page 18 of the government's brief[56a] are equally irrelevant. None of them concern Section 9(a) proceedings. When the 1948 Act was passed Congress had before it the established construction that the 1921 Act did not affect Section 9(a). In addition Congress had before it the record of the Settlement of War Claims Act of 1928 under which 80% of German *enemy* property was returned and 20% retained. The decision to retain not 20%, but 100% of such enemy property would not create any new implications concerning Section 9(a).

Reference in the government's brief[57] to the protests of certain persons during the committee hearings do not assist the construction contended for by petitioner. The protests in question did not identify Section 9(a) and no conclusion can be drawn from the lack of comment or action upon such protests.[58]

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55. Brief, p. 18 and note 9.

56. Cited in the government's brief, p. 18.

56a. *United States* v. *Chemical Foundation*, 272 U. S. 1, 11; *Munich Reinsurance Co.* v. *First Reinsurance Co.*, 6 F. 2d 742, 747-9 (C. A. 2); *Junkers* v. *Chemical Foundation*, 287 Fed. 597 (S. D. N. Y.); *Lange* v. *Wingrave*, 295 Fed. 565 (E. D. La.).

57. Brief, p. 24-27.

58. Speculation is not necessary in view of the Acheson—Cutler construction as well as the construction of previous similar

The discussion as to legislative history (government brief, pp. 24-30) is surprisingly consistent with the proper purpose of Section 39, *i. e.*, that *enemy* property would be forfeited, reversing the policy of the Settlement of War Claims Act of 1928.

The fear expressed by Congressman Cox (Brief, p. 30) that many innocent persons would lose their all was at once replied to by Congressman Hinshaw who from the floor of the House stated:

> "Section 32(a) of the Trading with the Enemy Act exempts a great deal of property taken over by the Alien Property Custodian. Any property that has been wrongfully taken over from a friendly alien living in the United States, I understand may be returned to him." (94 Cong. Rec. I, page 552.)

Congressman Hinshaw's reference to a section number meant little, for the gist of his statement was contained in his second sentence from which the conclusion to be drawn is that Section 39 does not deny the rights of friendly resident aliens. A reading of the Record will show that with the encouragement of such assurances the law was considered acceptable by members who had expressed doubts as to its fairness; and nowhere in the Congressional Record or in the hearings of the subcommittee is there an explicit indication that Section 9(a) suits would be affected.

It will be recalled that Section 39 was first proposed in a manner which indicated clearly that the purpose of the government was to dispose only of the enemy property remaining after Section 9(a) returns. In view of the repeated refusal of Congress to grant express requests

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legislation (the 1921 Act) but the very existence of the latter guides would reasonably suggest the conclusion that the fears expressed by the witnesses were treated as groundless and irrelevant so far as residents of the United States are concerned.

to amend Section 9(a),[59] Section 39 appears to have become a kind of Trojan horse whose hidden purpose became disclosed only after the Act was safely past the legislative gates.

II.

No Amendment or Repeal of Section 9(a) Could Have Been Lawfully Accomplished by the Form in Which Section 39 Was Passed.

Section 9(a) is not referred to in Section 39. Since Section 39 was in the first instance proposed by the Office of Alien Property as legislation which would not affect Section 9(a) it is perfectly apparent that no compelling reason exists for saying that Section 39 must be given a construction which impliedly affects Section 9(a). Particularly is this true of a retroactive repeal by implication. The present case was pending in the United States District Court (R. 2) before the enactment of Section 39 on July 3, 1948.

Title 1 U. S. C., Sec. 109[60], provides:

> "The repeal of any statute shall not have the effect to release any penalty, forfeiture or *liability* incurred under such statute, unless the repealing Act *shall expressly so provide*, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability." (Emphasis supplied.)

The above statute has been held to be a general saving clause to be read and construed as a part of all subsequent

59. See discussion, opinion below (R. 63).

60. Act of July 30, 1947, 61 Stat. 633.

repealing statutes.[61] *Hertz* v. *Woodman*, 218 U. S. 205, 216, 217 (1910).

In Sutherland on Statutory Construction, 3rd Ed., p. 531, it is stated:

> "Where a statute is repealed, a general saving statute operates to save any substantive rights of a private nature, liability, right of action, penalty, forfeiture, or offense which has accrued under the repealed statute.
>
> "For typical provisions, see 1 U. S. C. (1934), Section 29."

1 U. S. C. 29 was identical with the present I U. S. C. 109.

The argument that Section 9(a) was repealed in whole or in part, by mere implication is refuted by *Markham* v. *Cabell*, 326 U. S. 404, 410 (1945). In that case the Custodian made a similar contention that the settlement of War Claims Act of 1928 effected a partial repeal by implication of Section 9(a) and the Court replied:

> "The right to sue, explicitly granted by Section 9(a), should not be read out of the law unless it is clear that Congress by what it later did withdrew its earlier permission."

Retroactive legislation is not favored by the courts and (independently of the above 1 U. S. C. 109) retroactive construction is not given to legislation unless the language employed is so clear that it admits of no other construction.[62] To say that Section 39 not only repealed or superseded Section 9(a), but did so retroactively, flouts the settled rules of statutory construction.

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61. The question whether a statutory right to sue for the return of condemned property was preserved by an identical statute was in issue and considered by the Court in *Hutton* v. *Autoridad Sobre Hogares de la Capital*, 78 F. Supp. 988 (D. C., Puerto Rico, 1948) (decided on other grounds).

62. Sutherland on Statutory Construction (3rd Ed. 1943), Vol. 2, Secs. 2201, 2212.

III.

Congress Did Not Have the Power Under the Constitution to Deprive Respondent as a Friendly Alien of Her Right to Obtain the Return of Property Erroneously Seized.

The constitutional objection is aggravated by the fact that the asserted deprivation of rights arises by mere implication. As stated in *Becker* v. *Cummings*, 296 U. S. 74, 80:

> "Only compelling language in the congressional enactment will be construed as withdrawing or curtailing the privilege of suit against the government granted in recognition of an obligation imposed by the Constitution. See *Lynch* v. *United States*, 292 U. S. 571, 586, 587; *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, 489. Hence 9(a) must be broadly construed to give effect to its remedial purpose, see *Miller* v. *Robertson*, 266 U. S. 243, 248; *Behn, Meyer & Co.* v. *Miller*, 266 U. S. 457, 471, 472."

The constitutional inhibitions are well known and have been restated many times. The right of seizure is dependent upon adequate provision made for return in case of mistake: *Central Trust Co.* v. *Garvan*, 254 U. S. 554, 566 (1920); *Becker* v. *Cummings*, 296 U. S. 74, 79 (1935). The guarantees of the Constitution extend to friendly aliens. *Silesian-American Corporation* v. *Clark*, 332 U. S. 469, 479 (1947). The word "friendly" is as applicable to a loyal resident alien, even though of enemy nationality, as it is to one of our own citizens; *Ex Parte Kumezo Kawato*, 317 U. S. 69, 71 (1942); *Stadtmuller* v. *Miller*, 11 F. 2d 732, 738 (C. C. A. 2d, 1926); *Vowinckel* v. *First Federal Trust Co.*, 10 F. 2d 19 (C. C. A. 9th, 1926); *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950).

Congress may have the power to declare resident aliens to be enemies on the sole ground of enemy citizenship.

The point is immaterial because the power has never been exercised. No new definition of "national" has been adopted by Congress. Neither Congress nor the Executive has declared American residents to be enemies on the ground of nationality alone. No authority has ever been given to vest their property on the ground of citizenship by itself. It is apparent that our policy has continued to follow the traditional concepts set forth in Alexander Hamilton's Camillus Letter (*supra*, p. 25 n. 44).

If it were possible, therefore, to arrive at the conclusion that Section 39 did take away the right of suit granted under Section 9(a) this could only be done on a construction to the effect that Section 39 was intended to deny to *friendly* aliens their constitutional guarantees. But as so clearly appears here the construction which produces the constitutional jeopardy is the unreasonable one and the construction which preserves the constitutional guarantees is not only reasonable *but is the precise construction given by petitioner when it proposed the legislation to Congress.*

Far from supporting petitioner's extreme position, the case of *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950), cited in the government's brief (p. 38), actually demonstrates the validity of the constitutional doubts raised by the Government's construction of Section 39.

The *Eisentrager* case involved twenty-one German nationals who had been convicted of violating the laws of war while engaged in military activity against the United States. They were tried by an American military commission in the China theatre, convicted, and subsequently incarcerated in Germany. None of them had ever resided in the United States.

These non-resident German enemies filed petitions for

habeas corpus in the Federal District Court for the District of Columbia. They alleged that they had been deprived of due process of law in violation of the Fifth Amendment to the Federal Constitution because the commission which had conducted their trials was without jurisdiction to try them for their alleged war crimes. The Court of Appeals for the District of Columbia and three of the justices of the Supreme Court itself were of the opinion that the protection of the Fifth Amendment went so far as to be extended to these non-resident admitted enemies. The majority of the Court was careful to make clear that, although in its opinion the protection did not extend to this point, its holding was limited to a person who

> "(a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States." (Page 777.)

Although the Court's remarks about enemies were concerned with the general law of war and not with the legislatively defined concept of enemy created under the Trading with the Enemy Act, the Court strongly stressed the point that even under the common law a great distinction existed between the non-resident enemies involved in the case and resident "enemy aliens". As to such persons, the Court cited with approval a declaration of Chancellor Kent which is very different from his comments on enemies in general quoted in the government's brief. The Court stated:

> "Our rule of generous access to the resident enemy alien was first laid down by Chancellor Kent in 1813, when, squarely faced with the plea that an alien enemy

> could not sue upon a debt contracted before the War of 1812, he reviewed the authorities to that time and broadly declared that 'A lawful residence implies protection, and a capacity to sue and be sued. A contrary doctrine would be repugnant to sound policy, no less than to justice and humanity.' " (Opinion page 776.)

The Court cited with approval *Ex Parte Kumezo Kawato*, 317 U. S. 69 (1942) in which, speaking of resident aliens of enemy nationality, it was said that our laws "promise protection to all who abide by them."

The *Eisentrager* case makes it clear that there exist grave doubts that constitutional rights under the Fifth Amendment could be withdrawn from residents of the United States who are, at most, technical enemies. But that question does not even exist in the present *Nagano* case, where under the Trading with the Enemy Act the lawful resident alien is deemed by Congress to be a non-enemy, that is to say, a friendly alien, whose constitutional protection cannot be in question.

IV.

1. There Is No Merit in the Contention of Petitioner That Respondent Was "Resident Within" Japan Since Her Permanent Residence Within and Intention to Return to the United States Are Admitted and It Is Not Only Alleged in the Complaint But Established by Administrative Findings That Her Presence in Japan Was Temporary, for Family Purposes Shared With Respondent's Resident Husband.

2. There Is No Merit in the Claim That Any Question of Construction Exists Respecting the Words "Resident Within" as Used in the Statute Since the Law Applicable to the Particular Facts of the Present Case Has Been Established by Repeated, Uniform Decisions Over a Thirty-Four Year Period.

1. The facts alleged or competent under the complaint include: (a) respondent's admitted residence in the United States (R. 2, 3, 51); (b) her admitted lack of any intention to surrender that residence (R. 3, 51); (c) the circumstances of compulsion characterizing her absence in Japan; (d) the family character of the purpose shared with the husband; (e) the undeniable reality that respondent was a wife whose intention to rejoin her resident husband cannot be doubted; (f) the admitted temporary character of the absence; and (g) the concurrence of the State Department and the Justice Department, after independent investigations and hearings, in the finding that Mrs. Nagano was a permanent resident of the United States whose absence was temporary only.

Surely these considerations bar any conclusion at this time that respondent was "resident within" Japan. Having been correct on the facts the decision below presents no questions of law meriting review in this Court.

The government itself admits in its brief that the mere presence of respondent in Japan would not make her a "resident within" an enemy country if (1) her presence was the result of compulsion; or (2) her presence was temporary.[63] Both of these conditions are met in the present case.

Mr. and Mrs. Nagano's daughters were compelled by our immigration laws to make their permanent homes in Japan.

63. Government brief, pp. 41, 47.

The daughters could not plan a life in this country because, being of Japanese birth, they could not be here more than temporarily under any circumstances. The election to arrange marriages in Japan was compulsory because our immigration laws made it so.

The presence of the daughters in Japan being thus made compulsory by law, the temporary presence of the mother was the necessary consequence of a statutory compulsion. The mother's presence in Japan was not on any individual errand of her own. She was with her daughters as the representative of the two parents, carrying out a family obligation. Her presence was no more a matter of free choice than is the "decision" of any parents to provide food, shelter and education to their children. It is not for the government to say whether Japanese custom was right in demanding the presence of the parent to arrange the marriages of the daughters (R. 6). The daughters were compelled by our own law to remain in Japan and their needs are to be measured by the demands of that country.

Since the government has not sought review of the record in the companion case of *Shinsaku Nagano* v. *McGrath*, 187 F. 2d 753 (C. A. 7th, 1951), this court does not have before it the record in that case of the evidence which would also be competent in the present case. Inferences favorable to respondent are admitted and it is possible to conceive, within limits, of the evidence existing behind the allegations. However, the sparse framework of an allegation and the cold logic of a rule of law are poor substitutes for the warm force of the living facts. Does a theoretical admission that Mrs. Nagano was anxious to return to this country conjure up the realization of the character of respondent's duties which is presented by her letter to her husband stating:

"Masako has already reached the age of 26. Un-

less I can arrange her marriage this spring I shall have no desire to live longer. It is not good for her to live alone and have her marriage delayed too long. It will change her character. In fact, lately I can no longer control her. I feel that it would be better if I were dead. On many days she is gloomy and moody. I can hardly endure watching her so depressed. I have not told you this before, but have kept my sorrow to myself. I have neither selfish ambition nor personal desire, but only her happiness in mind. Every day, I feel as if I were sitting on a prickly matting studded with needles * * *"

Is a legal presumption as meaningful as a letter stating:

"Now it looks as if both our daughters are going to be married at the same time. * * * When our two daughters are married, my duty will be all over and a great burden will be off my shoulders. * * * I shall be so anxious to join you immediately and I would like to live a very simple life over there to make up for what I have lost in the past. * * *"

The question whether the period of 1933 to 1941[64] represents a temporary absence is a fact question dependent not on the length of the period but on all the circumstances of the absence. The very reasons for the absence were of a self-limiting character. Both Mrs. Nagano and her husband expected the marriages to be arranged within a relatively short period. Masako attained a marriageable age (18 years) in 1932; her sister Takako reached that age in 1937. Mrs. Nagano's correspondence reported progress and on occasions in 1939, 1940 and 1941 reported that marriages were imminent. Other letters recorded bitter disappointment. In the plans of Mrs. Nagano and her husband her absence in Japan was not only transitory but in effect she was packed and ready to leave by the next ship.

64. See Statement, *supra*, p. 7.

Also it must be remembered that the evidence includes not only the immediate purpose of the absence but the whole background of circumstances establishing the permanent American residence of both husband and wife. Mention has been made (see statement, *supra*, p. 5) of the husband's identification with the activities of the community; his permanent investments in Chicago; even his testamentary plan. These circumstances, too, bear upon the temporary and compulsory character of Mrs. Nagano's absence. It is neither realistic, nor just, nor consistent with the facts and inferences admitted by a motion to dismiss, for the petitioner to urge that Mrs. Nagano was resident within Japan. Respondent was plainly not resident within Japan within the ordinary legal meaning of the word residence.

2. The foregoing facts present no borderline question requiring construction of the term "resident within". None of the cases which have involved questions of residence within the enemy country present any question as to the proper application of the law to the facts of the present case. The cases decided since the passage of the Act in 1917 (a period of thirty-four years to date), include *McGrath* v. *Zander*, 177 F. 2d 649 (1949); *Sarthou* v. *Clark*, 78 F. Supp. 139 (D. C. Cal. 1949); *Stadtmuller* v. *Miller*, 11 F. 2d 732 (C. C. A. 2d, 1926); *Vowinckel* v. *First Federal Trust Co.*, 10 F. 2d 19 (C. C. A. 9th 1926); and *Miller* v. *Sinjen*, 289 Fed. 388 (C. C. A. 8th, 1923). All of these cases support the reasonable principle that presence in a country for purposes of a merely temporary character falls short of establishing residence. There exists no conflict of decision among any of these cases.

In the *Zander* case the plaintiff, an American woman, while present in Germany during the war married a soldier

in the German army. Although the marriage bestowed German citizenship on plaintiff, the court held:[65]

> "* * * Conceded facts leave only the legal question whether she was '*resident within*' Germany. Citizenship is not directly involved."

On the basis of the particular facts of the case the court held that Mrs. Zander was not resident within Germany notwithstanding her physical presence there and her marriage.

It is respectfully submitted that this court does not take jurisdiction for the purpose of considering the interminable distinctions and similarities which can be drawn between the particular facts of cases such as the *Zander* case and the particular facts of this present *Nagano* case.[66] That office was performed by the Court of Appeals and no important reason exists for reviewing its decision. However, the following observations concerning the *Zander* case are illustrative:

> (a) As in all the cases cited, the court recognized that mere temporary presence is not "residence within".
>
> (b) Plaintiff did not become "resident within" Germany even though she went there voluntarily; nor did the added fact make any difference, that while Germany was at war she voluntarily married a German national, so long as it appeared that she had a genuine intention to return home with her husband when the war bars were removed.
>
> (c) Recognition was given not merely to the activities of the wife as an individual, but to the activities of the husband, which supported the conclusion that the intent to return to this country was genuine. Com-

65. 177 F. 2d 652.

66. As the petitioner is at pains to point out the facts in each case differ from the *Nagano* case. That is to be expected. The facts in each case also differ greatly from the facts in each other case.

ment has been made elsewhere in this brief on Mr. Nagano's status in the community.[67]

(d) Recognition was given to the steadfastness of purpose of Zander and his wife which carried them through the war and brought them out of it reunited as they had planned from the beginning. As the court said,[68] "the good faith of this undertaking is proven by the persistency with which both pursued it to a final consummation." The same quality of steadfastness and persistency is abundantly present in this *Nagano* case. A mission involving a difficult separation was commenced and carried out to the end that the daughters might have the enduring marriages which our oriental exclusion laws made not possible in this country. In the end the Naganos were reunited as they too had planned from the beginning.

(e) In the *Zander* case the court considered the presumption that the plaintiff's residence was with her husband in Germany. Presumably this point was urged by the government. The court recognized that the rule existed but held that it must yield to the facts. In the present *Nagano* case, the presumption becomes of vital importance because it runs with the facts and not against them. It accords with the findings of the State Department and the Justice Department, Immigration and Naturalization Service; it accords with the allegations of the complaint; and it accords with respondent's actions.

In *Sarthou* v. *Clark*, 78 F. Supp. 139 (D. C. Cal. 1949) the words "resident within" as used in the Act were re-examined in the light of the World War II amendments.[69] Notwithstanding the claimant's physical presence in Germany where he owned a villa other facts showed clearly

67. See statement, *supra*, p. 5.

68. 177 F. 2d 653.

69. Petitioner makes the statement (brief, 47) that the "asserted enemy in *Sarthou* could be deemed a transient sojourner." Von Neindorff's annual stays in Germany went back a great many years. His purchase of a villa was not the act of a "transient" in the sense used by the government, *i. e.*, one merely "passing through."

that he regarded Tulare County, California as his home. The court accordingly followed the uniform rule that mere presence is not residence when a consideration of all of the facts, including the element of intention, shows that the presence was merely temporary.

The same considerations dominate the cases of *Vowinckel* v. *First Federal Trust Co.*, 10 F. 2d 19 (C. C. A. 9th, 1926); *Stadtmuller* v. *Miller*, 11 F. 2d 732 (C. C. A. 2d, 1926) and *Miller* v. *Sinjen*, 289 Fed. 388 (C. C. A. 8th, 1923). Each case involved:—(1) A suit under Section 9(a); (2) presence within the enemy country; and (3) a finding, upon all the facts, that the presence was temporary and did not amount to "residence within". In the *Vowinckel* case the plaintiff was a German alien doctor who was a permanent resident of the United States. In 1915, long before this country entered the war, he entered the service of the German Red Cross—a temporary but laudable purpose. Mrs. Nagano's purpose was temporary and the court below found it to be praiseworthy. The duty of a parent to a child is not wholly a private and personal matter. Society places such obligations in a special class. Up to a certain point they are made compulsory; beyond that they continue to merit special recognition. In the *Stadtmuller* case the plaintiff, a German citizen, was visiting Germany at the outbreak of war and was detained there until the war was ended. The element of constraint, during the war, was held to negative any "residence within" Germany.[70] The *Sinjen* case involves the issue in a Section 9 (a) suit whether plaintiff could prove that during his stay in Germany he had the intention of retaining his American citizenship, of returning to the United States and remain-

70. Certainly any realistic appraisal of the circumstances will include the recognition that during the war Mrs. Nagano had no possible chance of obtaining permission to leave Japan or to enter the United States.

ing there permanently.[71] The detailed facts in the *Sinjen* case, laid parallel with the facts in the *Nagano* case, are strongly persuasive that the *Nagano* case is a meritorious one for application of the general rule that mere temporary presence is not residence. Material elements in the *Sinjen* case included the leaving of Nebraska property in the care of a brother-in-law; the investment of income in the United States; non-participation in German affairs and so on. Without extending the discussion of facts, each such element has its far more persuasive counterpart in the *Nagano* case.

The government discounts the *Sinjen* case, stating (Brief p. 49, n. 24): "it dealt with the concept of residence necessary to work an expatriation under the nationality laws; it in no way involved the concept of residence under Section 2(a) of the Trading with the Enemy Act." However, in that case the court expressly declared that the issue was whether plaintiff could prove he had the *intention* of returning to the United States. Intention is one of the important elements of residence in the usual sense of the word. While thus discounting the *Sinjen* case the government cites *Savorgnan* v. *United States*, 338 U. S. 491, to establish that intention is not an element of residence. There are these differences, however: (1) the *Savorgnan* case is not a suit under the Trading with the Enemy Act but was a suit brought under the Nationality Act of 1940 to obtain a judgment declaring the United States citizenship of the plaintiff in that case; (2) the facts are completely irrelevant: petitioner in that case was a native born United States citizen who had applied for and received naturalization as an Italian citizen and thereafter had gone to Italy to live; and (3) on the issue of residence, the Court was following certain specific language in Sections

71. It is clear that Sinjen was no "transient sojourner." His stay in Germany was extended.

403(a) and 104 of the Nationality Act of 1940 as this had been construed under the report of the Secretary of State, Secretary of Labor and the Attorney General to the Congress on the proposed bill which thereafter became the Act in question. The quoted language from the opinion (Appellant's brief, p. 51) is not on the general construction of the word "residence" at all, but merely a restatement by the Court of the construction given this particular Act by the above report to Congress—a construction which modified, for nationality purposes, the concept of residence existing under previous Acts.

In its brief the government makes the incorrect statement that the court below "equated" residence to domicile. We are sure the court was not unfamiliar with the well known distinctions between residence and domicile. Indeed the distinction is expressly recognized in the two most recent cases of *Sarthou* v. *Clark*, 78 F. Supp. 139 (D. C. Cal., 1949) and *McGrath* v. *Zander*, 177 F. 2d 649 (1949), wherein the respective courts involved specifically stated that residence has certain domiciliary qualities. The concern of the court below, however, was not with domicile but with application of particular facts to the question of residence in the light of a uniform series of decisions rendered over a period of thirty-four years. Not one of these cases involved the slightest question of construction of the word residence; the question in each case has been primarily one of fact as must necessarily be true whenever a statute employs a broad term such as "residence."

As stated in Kennan on Residence and Domicile (1934)[72] p. 28:

> "All the authorities agree that each case must be decided in its own particular circumstances and that general definitions are calculated to perplex and mis-

72. Cited by petitioner: brief, p. 42.

> lead. It is apparent that the word residence, like domicile, is often used to express different meanings according to the subject matter. * * * The word 'residence' is an elastic term of which no exact definition, which is applicable in all cases can be given at law, but it must be construed in every case in accordance with the object and interest of the statute in which it occurs. * * *"

Clearly no arbitrary application of the word residence can be permitted to jeopardize the broad purpose of the Trading With the Enemy Act. The policy of the Act is to provide wide latitude to make seizures upon suspicion, but for this very reason it is all the more necessary to assure that returns are to be made in case of mistake.[73] *Intention* is a primary element of residence, and while the evidence in this regard has not been heard in the present case, enough was heard by the Justice Department, Immigration Service, to lead it to the conclusion that there was *ample* evidence to support the determination made by the Board of Special Inquiry and the American Consular Service that respondent was returning from a temporary visit abroad. There are facts in the present case which are peculiarly significant on the question of residence. Respondent was not in Japan as an unattached person. She was there as an extension of a family unit which was resident in the United States. Her means of support derived not from activities in Japan but from her husband in the United States. Residence is commonly said to be established for business, health or pleasure. But respondent's purpose in Japan was none of these. It was the performance of a parental duty common to both members of the family unit. The actual physical residence of the supporting member of the family—the husband—continued in the United States, without any intention that the husband and wife were ever to be

73. *Supra*, p. 16; constitutional guarantee of return in case of mistake, *supra*, p. 37.

separated persons. The court below has rightly decided that upon consideration of all the facts it cannot be concluded that respondent was "resident within" Japan.

The government did not contend in the Court of Appeals nor in its petition for a writ of certiorari that respondent's mere physical presence in the enemy country at the outbreak of war is by itself a complete bar to recovery under Section 9(a). That contention, belatedly added to the government's brief,[74] is without merit because no such drastic nullification of Section 9(a) was ever contemplated by any World War II legislation or Executive Orders.

Petitioner's argument is based on the provisions in Section 32(a) and Executive Order 9095, as amended.

Section 32(a) authorizes certain discretionary administrative returns limited to instances which are found to be "in the interest of the United States." The discretion is absolute; no judicial review is authorized.[75] The section is not a substitute for Section 9(a). Primarily it is concerned with persons who were technical enemies, such as Frenchmen and Belgians residing in territory occupied by the enemy.[76] Under Section 32(a) discretionary administrative relief is barred to persons of enemy nationality present in the enemy territory (except persecutees). When Section 32(a) was passed Section 9(a) was not amended. No basis whatever exists for the assertion that the limitations and guides for the exercise of discretion under Section 32(a) must be carried over into Section 9(a). In *McGrath* v. *Zander,* 177 F. 2d 649, 652 (1949), the court specifically stated:

"Although with certain exceptions citizenship and

74. It is also noted that no such contention is apparent in the Questions Presented or the Specification of Errors in the government's brief.

75. So stated in the government's brief, p. 12.

76. So stated in the government's brief, p. 12.

presence within the territory of an enemy country ban relief under the discretionary authority granted by Section 32(a) they of themselves do not bar recovery under Section 9(a)."

Nor can any inference be drawn that the residence test of enemy character for the purpose of returns under Section 9(a)[77] has been nullified by the provisions of Executive Order 9095 relating to the *vesting* of property belonging to persons "within" the enemy country, since while mere presence by itself may justify vesting as an initial step, yet it is no test of enemy character and it has never been held to be a bar to the return of property under Section 9(a).

Vesting takes place on suspicion, the action being taken on appearances and without investigation.[78]

As a practical matter mere presence in the enemy territory is sufficient to justify an assumption, for *vesting* purposes, that residence exists. In time of war there is scant opportunity for inquiry into the situations of persons known to be in the enemy country. In all of the Section 9(a) cases cited and discussed in this brief the individuals involved were in but not resident in the enemy country, and the vesting, as an initial step, was justified.[79]

77. See Section 9(a), *infra*, App. p. i authorizing returns to persons "not enemies"; and Section 2, *infra*, App. p. i defining enemies as persons "resident within" the enemy territory.

78. *Supra*, p. 16 and n. 15; *Clark* v. *Uebersee Finanz-Korporation*, 158 F. 2d 313, 315. Cf. *Lamar* v. *Brown*, 92 U. S. 187, 196 (1875) stating: "The military forces act in the field according to the laws of war and seize that which is apparently the subject of capture. They act upon appearance, not upon testimony. * * * Their duty is to seize and hold, leaving it to the owners to make good their claim, as against the capture, in the appropriate tribunal established for that purpose."

79. As far back as the Civil War it was held that persons residing in the confederate states must be considered as enemies *while they remained* in those states, "but this has never been held in respect to persons faithful to the Union, who have escaped from those states and subsequently resided in the loyal states or in neutral countries": *The Peterhoff*, 5 Wall. 28, 60 (1866).

Moreover, the actual physical control which the enemy country can exercise over persons within its borders makes vesting justifiable or necessary as an initial step. The government itself says (brief, p. 43):

> "The definition of 'enemy' in Section 2 is framed on the hypothesis that the *presence* of the owner behind the enemy's lines puts his American property within the power of the enemy government. Accordingly the owner, regardless of citizenship or personal sympathies, is classed as an 'enemy.'" (Emphasis supplied.)

Therefore, the provisions of Executive Order 9095, as amended, with reference to persons "within" the enemy country, mark no change of policy as regards the vesting of property and do not support petitioner's contention that in World War II "presence" in the enemy country has become a bar to returns under Section 9(a).

In contrast to the standards upon which vesting takes place, returns of property are made only after investigation. The inquiry then becomes whether the individual involved was or was not an enemy. In World War II the concept of enemy was broadened, as authorized under amended Section 5(b) to include persons "acting for (including cloaks for) the enemy." As explained in *Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480, 485, Germany in particular had developed techniques for concealing enemy ownership, particularly through the corporate guise, and Section 5(b) of the Act was amended to cope with the problem of enemy interests which masqueraded under innocent fronts. The Court declared (page 487) that Sections 2, 5(b) and 9(a) should be given the most harmonious reading possible so that one section would not defeat the purpose of any other. Thus a person acting for the enemy, or an apparently friendly corporation owned or controlled by the enemy, would be considered an enemy for the pur-

pose of returns under Section 9(a). *The court however expressly negatived the argument that once the seizure is shown to be permissible under Section 5(b) there is no remedy under Section 9(a).* Yet such is the argument here presented by the government—that the mere presence in the enemy country, which authorizes vesting, by itself bars returns.

The obvious answer is that no significance attaches, as regards returns under Section 9(a), to the executive policy set forth in Order 9095 that vesting is justified on the ground of presence alone. If the executive intention had been otherwise it is to be doubted that the legislatively prescribed test of residence could arbitrarily be changed by fiat. No such authority was conferred under broadened Section 5(b).

The *Uebersee* decision has been followed in the above *Guessefeldt, Sarthou* and *Zander* cases (as well as in the present *Nagano* case), all holding that (absent other factors) mere presence within the enemy territory is not a bar to the return of property in Section 9(a) proceedings when it is established that the claimant was not resident within the enemy territory.

Conclusion.

For the reasons stated it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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November, 1951.

APPENDIX.

Excerpts from the Trading with the Enemy Act of 1917, as amended (U. S. C. Title 50 Appendix):

§ 2. Definitions. The word "enemy" as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

> (a) Any individual * * of any nationality, resident within the territory * * of any nation with which the United States is at war * *.

§ 5(b) (as amended on December 18, 1941 by Title III of the First War Powers Act (U. S. C. Title 50, pocket part, Appendix Sec. 5(b)). During the time of war * * any property or interest of any foreign country or national thereof shall vest when, as and upon the terms directed by the President * *.

§ 9(a). Any person not an enemy * * claiming any interest, right or title in any money or other property which may have been seized by him (the Custodian) hereunder * * may file with the said custodian a notice of his claim * *. * * if the claimant shall have filed the notice as above required, said claimant may institute a suit in equity * * in the district court of the United States for the district in which such claimant resides * * to established the interest, right, title or debt so claimed, and if so established, the court shall order the * * delivery to said claimant of the money or other property so held by the Alien Property Custodian.

§ 12. * * After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct * *.

§ 32(a). The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine—

(1) that the person who has filed a notice of claim for return, in such form as the President or such officer or agency may prescribe, was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian, or is the legal representative (whether or not appointed by a court in the United States), or successor in interest by inheritance, devise, bequest, or operation of law, of such owner; and

(2) that such owner, and legal representative or successor in interest, if any, are not—

* * * * *

(D) an individual who was at any time after December 7, 1941, a citizen or subject of Germany, Japan, Bulgaria, Hungary, or Rumania, and who on or after December 7, 1941, and prior to the date of the enactment of this section (March 8, 1946) was present (other than in the service of the United States) in the territory of such nation or in any territory occupied by the military or naval forces thereof or engaged in any business in any such territory, Provided That notwithstanding the provisions of this subparagraph (D) return may be made to an individual who, as a consequence of any law, decree or regulation of the

nation of which he was then a citizen or subject, discriminating against political, racial or religious groups, has at no time between December 7, 1941 and the time when such law, decree or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation; * *

§ 39. (Section 12 of the War Claims Act of 1948, 62 Stat. 1246, enacted July 3, 1948.) No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agent of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. The net proceeds remaining upon the completion of administration, liquidation, and disposition pursuant to the provisions of this Act of any such property or interest therein shall be covered into the Treasury at the earliest practicable date. Nothing in this section shall be construed to repeal or otherwise affect the operation of the provisions of Section 32 of this Act or of the Philippine Property Act of 1946.

Excerpts from Executive Order 8389 (April 10, 1940, 5 F. R. 1400 as amended by Ex. Ord. No. 8785, June 14, 1941, 6 F. R. 2897; Ex. Ord. No. 8832, July 26, 1941, 6 F. R. 3715; Ex. Ord. No. 8963, Dec. 9, 1941, 6 F. R. 6348; Ex. Ord. No. 8998, Dec. 26, 1941, 6 F. R. 6787):

5. * * E. The term "national" shall include,

(i) Any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order, * *

(ii) Any person to the extent that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any national of such foreign country, and

(iv) Any other person who there is reasonable cause to believe is a "national" as herein defined * *.

Excerpts from Executive Order 9095 (March 11, 1942, 7 F. R. 1971, as amended Ex. Ord. No. 9193, July 6, 1942, 7 F. R. 5205; Ex. Ord. No. 9567, June 8, 1945, 10 F. R. 6917):

2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

(a) Any business enterprise within the United States which is a national of a designated enemy country * * and any interest of any nature whatsoever in such business enterprise held by an enemy country or national thereof;

(b) Any other business enterprise within the United States which is a national of a foreign country * * and any interest of any nature whatsoever in such business enterprise held by a foreign country or national thereof, when it is determined by the Custodian and he has certified to the Secretary of the Treasury that it is necessary in the national interest, with respect to such business enterprise, either (i) to provide for the protection of the property, (ii) to change personnel or supervise the employment policies, (iii) to liquidate, reorganize or sell, (iv) to direct the management in respect to operations, or (v) to vest.

10. For the purpose of this Executive Order:

(a) * * The term "national" shall have the meaning prescribed in section 5 of Executive Order No. 8389, as amended, *provided, however*, that persons not within designated enemy countries * * shall not be deemed to be nationals of a designated enemy country unless the Alien Property Custodian determines: (i) that such person is controlled by or acting for or on behalf of (including cloaks for) a designated enemy country or a person within such country; or (ii) that such person is a citizen or subject of a designated enemy country and within an enemy occupied country or area; or (iii) that

the national interest of the United States requires that such person be treated as a national of a designated enemy country.

General Saving Statute, 61 Stat. 633, 1 U. S. C. Sec. 109. The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall expressly so provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.